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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER

Case No. ICTR-2001-73-R75

ENGLISH
Original: FRENCH

TRIAL CHAMBER III

Before: Judge Andréia Vaz, presiding
Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registrar: Adama Dieng

Date : 9 September 2004

JUDICIAL RECORDS/ARCHIVES
DIRECTOR

2006 OCT 27 11 A 10: 56

A handwritten signature in black ink, appearing to be 'John Philpot', is written over the stamp.

THE PROSECUTOR

v.

PROTAIS ZIGIRANYIRAZO

DECISION ON MOTION FOR PROTECTIVE MEASURES
FOR DEFENCE WITNESSES

Office of the Prosecutor:
Stephen Rapp
Fatou Bensouda
Charity Kagwi-Ndungu

Counsel for the Defence:
John Philpot
Peter Zaduk

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber III (the "Chamber") composed of Judges Andréia Vaz, presiding, Flavia Lattanzi and Florence Rita Arrey;

BEING SEIZED OF the *Requête pour des mesures de protection des témoins de la Défense* [Motion for Protective Measures for Defence witnesses], filed on 3 February 2004, and of the *Addendum à la Requête pour des mesures de protection des témoins de la Défense*, filed on 5 February 2004 (the "Motion" and the "Addendum" respectively);

CONSIDERING "The Prosecutor's Response to the *Requête pour des mesures de protection des témoins de la Défense* and *Addendum*" filed on 10 February 2004, and the "Reply to the Prosecutor's Response to the Motion for Protective Measures for Defence Witnesses", filed on 11 February 2004 (the "Response" and the "Reply" respectively);

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence of the Tribunal (the "Rules"), particularly Articles 14, 19, 20 and 21 of the Statute, and Rules 69(A) and 75(A) of the Rules;

DECIDES as follows, based solely on the written briefs of the parties, pursuant to Rule 73(A) of the Rules

Submissions of the parties***Defence submissions***

1. The Defence submits that the Tribunal's protection system for witnesses is inadequate and guarantees neither the anonymity nor the safety of Defence witnesses or, worse still, protection against possible extradition to Rwanda. In support of its argument, the Defence cites the case of a protected Defence witness in the case of *The Prosecutor v. Emmanuel Ndingabahizi*, living in a European country, who came to testify before the Tribunal in November 2003, and whom Tanzania wanted to extradite to Rwanda.

2. The Defence alleges that its witnesses run a real risk of being extradited to Rwanda. The fact that there are no legal safeguards to protect Defence witnesses from such an eventuality prevents them from testifying. Consequently, in order to ensure that they appear in court, the Defence is requesting written guarantees from the Chamber.

3. Thus, the Defence prays the Chamber to render a decision enjoining the Registrar:

(a) to obtain from Tanzania guarantees that no Defence witness will be extradited to Rwanda;

(b) to obtain from Rwanda a guarantee that it will refrain from requesting the United Republic of Tanzania to extradite Defence witnesses;

(c) to order the holding of an ADAD-assisted inquiry into the extradition incident that occurred in *Ndingabahizi*;

- (d) to make public the results of the approaches and the guarantees obtained;
- (c) to report back to the Chamber in writing.

4. The Defence emphasized that witnesses from Rwanda must benefit from full and specific protection. The Defence further requests that protection of witnesses from African countries other than Rwanda, and those from non-African countries, should be guaranteed.

5. The Defence is of the opinion that a legal solution that would ensure that its witnesses are protected from being prosecuted by the courts of countries like Rwanda and Tanzania, and a possible request for extradition to Rwanda, would be to issue them safe conducts during their stay in Arusha.

6. In the light of the above, the Defence prays the Chamber to order the protective measures contained in Paragraph 42 of its Motion.

Prosecutor's submissions

7. The Prosecutor agrees that the same protective measures granted Prosecution witnesses by the Trial Chamber Decision of 25 February 2003 may also be granted to Defence witnesses.

8. The Prosecutor submits that it would be inappropriate for the Tribunal to request any form of guarantees from the Office of the United Nations High Commissioner for Refugees without first determining whether voluntary cooperation was available.

9. The Prosecutor underscored that the issuance of "safe-conducts" is at the discretion of the Witnesses and Victims Support Section, and that such practice cannot be changed in the instant case.

10. Besides, the Prosecutor is of the opinion that it would be inappropriate for the Chamber to *intervene* to protect Defence witnesses against a possible extradition to Rwanda. A solution should be found to this problem within the framework of the Agreement between the Tribunal and the United Republic of Tanzania. Furthermore, the Prosecutor suggests that the Defence should identify those who are on the lists of accused individuals published by the Rwandan Government to establish if its potential witnesses are on such list. On that basis, confidential communication to the Registrar would enable him to personally obtain from the Tanzanian authorities the guarantee that no State will prevent them from testifying before the Tribunal.

Defence Reply

11. The Defence submits that it does not know the details of the Rwandan Government's many lists of alleged wanted criminals.

12. The Defence criticizes the Prosecution for avoiding to raise before the Tribunal the key issue of Defence witness confidence. The Defence is of the view that the Chamber should

be concerned about the interference of the Rwandan Government in the business of the Tribunal and acknowledge its role as guarantor of a fair trial for the Accused. Thus, the Defence reiterates the submissions and requests in its Motion.

DELIBERATIONS

13. In addition to the protective measures requested for its witnesses, the Defence submitted some other motions relating to the case of *The Prosecutor v. Emmanuel Ndindabahizi*. Trial Chamber III holds that all the Defence motions relating thereto are inadmissible.

14. The Defence further requests measures, which, by their general nature, do not fall within the jurisdiction of the Chamber, which restricts itself to issuing appropriate protective measures for Defence witnesses. Therefore, such requests are also inadmissible. However, the Chamber notes that the current provisions on testimonies already offer some of the guarantees that the Defence is seeking.

15. The Chamber will now examine the other Defence requests in the light of Article 21 of the Statute and Rule 75 of the Rules. The Chamber notes that the Accused's right to a public hearing as provided for in Article 20 only applies subject to Article 21 of the Statute.

16. The Chamber recalls that Article 28 of the Statute obliges States to cooperate with the Tribunal. States are required to comply with this provision, which emanates from a UN Security Council Resolution under Chapter VII of the United Nations Charter. Unless a State fails to fulfil this obligation, or more specific requests are submitted before the Chamber, the Defence cannot seek an order from the Chamber requesting cooperation from States. Wherefore, the Defence's request is denied.

17. The Chamber further reminds the Defence that legal guarantees for the protection of witnesses are enshrined in the international instruments governing the relationship between the Tribunal and States. Article XVIII of the Agreement between the United Nations and the United Republic of Tanzania concerning the headquarters of the International Tribunal for Rwanda provides that the host country shall not exercise its "criminal jurisdiction" over witnesses and experts appearing before the Tribunal" and that "[w]itnesses and experts referred to in paragraph 1 above shall not be subjected by the host country to any measure which may affect the free and independent exercise of their functions for the Tribunal". The willingness of the United Republic of Tanzania to fulfil its commitments was reaffirmed in its letter to the Registrar dated 24 November 2003. Consequently, the Chamber holds the view that no other legal guarantee for the protection of witnesses is required. Wherefore, the Defence's request relating to the issuance of safe-conducts to Defence witnesses is denied.

18. Pursuant to Article 75 of the Rules, and to ensure a fair trial for the Accused and equality between the parties, while bearing in mind the situation of potential Defence witnesses and the unstable security situation in the Great Lakes Region in general, the Chamber considers that it would be necessary to order appropriate protective measures for Defence witnesses.

FOR THESE REASONS,

THE CHAMBER

GRANTS the following protective measures for all Defence witnesses or potential witnesses residing in Rwanda, in African countries other than Rwanda and outside the continent of Africa, who have not expressly waived their rights to benefit from protective measures and to all other Defence witnesses or potential witnesses who submit a request:

I. ORDERS that the names, addresses and whereabouts of, and any other information serving to identify the protected persons referred to in this Decision appearing in any existing file of the Tribunal be kept under seal by the Registry;

II. ORDERS that the names, addresses and whereabouts of, and any other information serving to identify the protected persons referred to in the present Decision be communicated only to the Witness and Victims Support Section ("WVSS") in conformity with established procedures and only in order to implement protection measures for these witnesses;

III. ORDERS that the names, addresses and whereabouts of the protected persons referred to in the present Decision and any other information identifying them in any existing files at the Tribunal be kept under seal;

IV. ORDERS the prohibition of the disclosure to the public or media of the names, addresses and whereabouts of the protected persons referred to in the present Decision and of any other information serving to identify them, in particular information contained in supporting documentation or in the records filed with the Registry, to mention but a few, and **DECIDES** that the present measure shall remain in force after the conclusion of the trial.

V. ORDERS the Prosecutor not to disclose, discuss or reveal to any individual or entity, other than his immediate colleagues, directly or indirectly, any documents or any other information contained in the records filed with the Registry and any other information for which disclosure has been ordered above, subject to details contained in measure VI;

VI. ORDERS the Prosecutor:

- (i) to indicate to the Witness and Victims Support Section of the Tribunal all his immediate colleagues who will have access to the protected information in compliance with the non-disclosure measures mentioned above;
- (ii) to advise the said Section in writing of any changes in the composition of the immediate team of the Prosecutor;
- (iii) to ensure that any immediate colleague leaving the team has remitted all documents and information capable of contributing to the identification of the protected persons referred to in the present Decision;

VII. ORDERS the prohibition of the disclosure to the Prosecutor of the names, addresses and whereabouts of the protected witnesses or potential witnesses referred to in the present Decision and of any other information serving to identify them and any information contained in supporting documentation or in the records filed with the Registry more than 21 days before they testify.

VIII. ORDERS that the Prosecutor shall make a written request, on reasonable notice, to the Defence when it wishes to contact any of the protected witnesses referred to in the present Decision; upon reception of such a request, the Defence shall facilitate such contact provided that the person (or his or her parents or guardian where he or she is under the age of 18 years) consents to an interview with the Prosecutor;

IX. ORDERS the public and the media not to make any audio recording, film or take photographs or sketches of the protected persons referred to in the present Decision without leave of the Chamber or the consent of the witness;

X. ORDERS that the immediate members of the Prosecutor's team shall not attempt to make any independent determination of the identity of any of the protected persons referred to in the present Decision or encourage or otherwise aid any person in any other way to attempt to determine the identify of any such protected persons;

XI. MAKES IT CLEAR that the measures ordered in V and XI above shall not be interpreted as preventing the Prosecutor from conducting normal investigations, as long as such investigations are not a deliberate attempt aimed at identifying the protected witnesses;

XII. ORDERS the Defence to designate a pseudonym for all the protected persons referred to in the present Decision to be used whenever referring to such witnesses in Tribunal proceedings, communication and discussions between the parties and the public;

XIII. DENIES the other measures sought in the Motion.

Arusha, 9 September 2004

Andrésia Vaz
Presiding

Flavia Lattanzi
Judge

Florence Rita Arrey
Judge

[Seal of the Tribunal]



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Arusha, 9 September 2004

Andrésia Vaz
Presiding

Flavia Lattanzi
Judge

Florence Rita Arrey
Judge

[Seal of the Tribunal]
